

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN J. KIELAR and U.S. POSTAL SERVICE,
POST OFFICE, West Palm Beach, FL

*Docket No. 98-2325; Submitted on the Record;
Issued August 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant forfeited her right to compensation for the period of July 1, 1995 to October 1, 1996 when she knowingly failed to report earnings from self-employment; and (2) whether the Office of Workers' Compensation Programs properly found that appellant was at fault in the creation of an overpayment of \$35,114.94, thus precluding waiver of recovery of the overpayment.

On July 23, 1991 appellant, then a 31-year-old letter sorting machine operator and distribution clerk, filed a notice of occupational disease, alleging that her federal employment aggravated her preexisting Charcot-Marie-Tooth disease. On January 29, 1992 the Office accepted a temporary aggravation of Charcot-Marie-Tooth syndrome. Appellant subsequently received compensation for total temporary disability. On November 22, 1994 the Office placed appellant on the periodic rolls to receive compensation for total temporary disability. Appellant was advised to notify the Office if she returned to work or became self-employed.

On October 1, 1996 appellant completed a Form CA-1032. She indicated that she had not worked for an employer, or been self-employed or involved in any business enterprise in the past 15 months. The form clearly indicated that appellant should report all self-employment or involvement in business enterprises.

On February 7, 1997 Postal Inspector Richard D. Koss submitted an investigative memorandum asserting that appellant was an owner and operator of Total Tool Service, Inc. and that she worked on a regular basis as the office manager of the business. He stated that Florida records showed that appellant filed for a fictitious name in June 1995 and was the registered owner and president of Total Tool Service, Inc. Postal Inspector Koss stated that appellant was observed opening the business, removing trash, answering telephones, accepting tools for repair, returning tools and accepting cash for repairs. He stated that, on March 19, 1996, appellant told him, while he was undercover, that she used a computer for the business, including billing and invoicing. He stated that appellant also accepted cash for a tool repair. Mr. Koss noted that

from 1994 through 1996 appellant obtained Palm Beach County Occupational Licenses listing herself as the owner of Total Tool Service, Inc. He noted that the business was incorporated on March 27, 1996 and that appellant was listed on the articles of incorporation as a director. The postal inspectors noted that appellant was listed as a person to be billed on telephone records, that she purchased advertising and that she listed herself as an owner on county vendor registration forms. He stated that papers retrieved from the company's trash indicated that appellant received faxes, took telephone messages, completed billing invoices, received letters at the business, signed letters as president of Total Tool Service, Inc., completed sales tax forms, listed herself as owner of the company with a trade association and performed banking transactions. Postal Inspector Koss stated that he interviewed appellant and she admitted to opening the business, answering the telephones, completing billing and invoicing, writing checks and delivering tools to customers. He further indicated that appellant told him that the business was listed in her name, but that she received no income from it. She stated that she joined a trade association to solicit business for her husband. Postal Inspector Koss also noted that appellant paid the monthly rent for the business.¹

By decision dated February 19, 1997, the Office terminated appellant's compensation effective March 2, 1997 because the medical evidence established that appellant's condition/disability resulting from her accepted injury had ceased.

On March 4, 1997 a disability benefits payment worksheet, Form CA-25, indicated that for the period of July 1, 1995 through October 1, 1996 appellant received \$35,114.94 in Federal Employees' Compensation Act benefits. The Form CA-25 was supported by Office computer case history reports showing the amount of benefits appellant received for this period.

By notice dated March 5, 1997, the Office advised appellant of its preliminary finding that an overpayment of compensation occurred in her case in the amount of \$35,114.94 because she failed to report self-employment or earnings during the period of July 1, 1995 through October 1, 1996 and therefore, her compensation for that time period was forfeited. The Office found that appellant was at fault in the creation of the overpayment because she did not report her self-employment and earnings and reasonably should have known to do so pursuant to detailed information requested on the Form CA-1032. The Office informed appellant that she had 30 days to request a telephone conference, submit additional evidence or request a precoupment hearing. The Office also provided appellant with an overpayment recovery questionnaire, Form OWCP-20.

By decision dated March 5, 1997, the Office found that appellant's compensation was forfeited for the period of July 1, 1995 through October 1, 1996 because she failed to report income from self-employment.

On April 3, 1997 appellant requested a precoupment hearing. She completed an overpayment recovery questionnaire, Form OWCP-20, in which she listed her assets and liabilities. Appellant did not submit any financial documentation concerning her assets and

¹ The postal inspector substantiated his investigative memorandum with transcripts of undercover conversations with appellant and a large volume of documentary evidence.

liabilities. She noted that her husband's business never made a profit and that she helped her husband's business prior to her injury. Appellant stated that she never received any earnings from the business. Appellant subsequently submitted her federal tax return showing that the business lost money.

At the hearing held on January 28, 1998, appellant's representative stipulated that appellant served as a front person for the business. Appellant then described the activities she performed at the business. She stated that she made coffee, occasionally answered telephones, balanced the checkbook on the computer and picked up parts. Appellant also stated that she accepted tools for repair. She also stated that she posted payments and processed with invoices. Appellant indicated that she did not receive a paycheck. She stated the work she did at the business was secretarial in nature. Appellant stated that she only wanted her husband to succeed in his business.

By decision dated June 8, 1998, the Office hearing representative affirmed the Office's March 5, 1997 decision and finalized forfeiture.

By decision dated July 7, 1998, the Office again found that an overpayment occurred in the amount of \$35,114.94 because appellant forfeited her right to compensation for the period of July 1, 1995 through October 1, 1996 by failing to report earnings and self-employment on a Form CA-1032. The Office found that appellant was at fault in creating the overpayment because she should have reasonably known to report the self-employment and earnings. The Office also found that recovery should be made in full because appellant failed to submit documentation corroborating the financial information she provided on the Form OWCP-20.

The Board finds that the Office properly found that appellant forfeited her right to compensation for the period July 1, 1995 through October 1, 1996 because she knowingly failed to report earnings from employment during that period.

Section 8106(b) of the Act² states in pertinent part:

"The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.... An employee who --

- (1) fails to make an affidavit or report when required; or
- (2) knowingly omits or understates any part of his earnings;
- (3) forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered ... under section 8129 of this title, unless recovery is waived under that section."³

² 5 U.S.C. § 8106(b).

³ *Garry Don Young*, 45 ECAB 621, 627 (1994).

Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) of the Act if she “knowingly” failed to report earnings from employment or self-employment. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings.⁴ Being a penalty provision, the forfeiture provided for in section 8106(b) of the Act must be narrowly construed.⁵ The term “knowingly” is not defined in the act or its regulations. In common legal usage, “knowingly” is defined as: “with knowledge; consciously; intelligently; willfully; intentionally.”⁶

The Office has the burden of proof in establishing that appellant, either with knowledge, consciously, willfully or intentionally, failed to report employment or earnings.⁷ To meet this burden of proof, the Office is required to closely examine appellant’s activities and statements in reporting employment or earnings.⁸ The Office may meet this burden in several ways: by employee’s own admission to the Office that they failed to report employment or earnings which she knew she should report; by establishing that appellant has pled guilty to violating applicable federal statutes by falsely completing the affidavits in the Form CA-1032;⁹ or by showing that, upon further inquiry by the Office as to employment activities, the employee continued not to fully and truthfully reveal the full nature of the employment activities.¹⁰

In the present case, the evidence establishes that appellant failed to report her earnings from her family business, Total Tool Service, Inc. for the period July 1, 1995 through October 1, 1996. The record indicates that appellant started the business in June 1995. Appellant admitted at the hearing and to postal inspectors in interviews, that the nature of her involvement in the family business, included opening the business, answering telephones, completing billing and invoicing, writing checks and delivering tools to customers. On her Form CA-1032 dated October 1, 1996 appellant wrote “no” to indicate that she had not worked for an employer or been self-employed or involved in any business enterprises in the past 15 months. The form specifically requested that appellant report all self-employment or involvement in business enterprise; including activities such as keeping books and records, managing or overseeing a business, including intermittent activities for a family business. Because the Form 1032 specifically instructed appellant to inform the Office of the same types of activities that she admitted to performing for Total Tool Service, Inc., the Board finds that appellant knowingly failed to report earnings and self-employment for the period of July 1, 1995 through October 1, 1996.¹¹

⁴ *Barbara Hughes*, 48 ECAB 398 (1997); *Charles Walker*, 44 ECAB 641 (1993).

⁵ *Barbara Hughes*, *supra* note 4; *Anthony A. Nobile*, 44 ECAB 268 (1992).

⁶ BLACK’S LAW DICTIONARY (5th ed. 1979).

⁷ *Barbara Hughes*, *supra* note 4; *Barbara L. Kanter*, 46 ECAB 165, 169 (1994).

⁸ *Barbara Hughes*, *supra* note 4; *see Royal E. Smith*, 44 ECAB 417, 419 (1993).

⁹ *Barbara Hughes*, *supra* note 4, *Barbara L. Kanter*, *supra* note 7.

¹⁰ *Id.*

¹¹ *See James H. Hopkins*, 48 ECAB 281 (1997).

The Board further finds that appellant received an overpayment of compensation in the amount of \$35,114.94. The Office correctly determined the amount of the overpayment based on the amount of compensation appellant received during the period July 1, 1995 through October 1, 1996 as obtained from the Office's computerized case history reports and calculated on its March 4, 1997 disability benefits payment worksheet. Furthermore, appellant does not dispute the amount of the overpayment. The calculation of \$35,114.94 is proper and for the reasons stated above, appellant was not entitled to this compensation due to her forfeiture of entitlement for this period.

The Board also finds that the Office properly determined that appellant was at fault in the creation of the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129(b) of the Act ¹² provides that an overpayment of compensation shall be recovered by the Office unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act and be against equity and good conscience.¹³ Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.¹⁴

The implementing regulation¹⁵ provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

The Office correctly determined that appellant was at fault in the creation of the overpayment, as she failed to furnish information which she knew or should have known to be material. As stated above, the Office specifically informed appellant on the Form CA-1032 that she must report all self-employment or involvement in business enterprise; including activities such as keeping books and records, managing or overseeing a business, including intermittent activities for a family business. Despite the Office's instructions, appellant failed to report these same activities that she performed for Total Tool Service, Inc. on her signed Form CA-1032. Therefore, appellant is with fault in the creation of the overpayment and the overpayment of compensation cannot be waived.

The decisions of the Office of Workers' Compensation Programs dated July 7 and June 8, 1998 are affirmed.¹⁶

¹² 5 U.S.C. § 8129(b).

¹³ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁴ *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹⁵ 20 C.F.R. § 10.320(b).

¹⁶ As there is no continuing compensation payable, the Board has no jurisdiction to review the Office's recovery

Dated, Washington, D.C.
August 16, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

of the overpayment.